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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

January 14, 2004

Barbara A. Schermerhorn Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE FRANK SADEGHY, Debtor.	BAP No. WO-03-045
JOHN T. HARDEMAN, Trustee, Plaintiff – Appellee, v. DUSTIN SADEGHY, Defendant – Appellant.	Bankr. No. 00-12278-TS Adv. No. 00-1145-TS Chapter 13 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Western District of Oklahoma

Before CLARK, BROWN, and THURMAN, Bankruptcy Judges.

PER CURIAM.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal.[1] The case is therefore ordered submitted without oral argument.

The Chapter 13 trustee (Trustee) commenced an adversary proceeding against the debtor's son, Dustin Sadeghy (Son), seeking to avoid a prepetition transfer of real

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

1 Fed. R. Bankr. P. 8012.

property pursuant to 11 U.S.C. § 544(b)[2] and Oklahoma fraudulent transfer law. After a trial, the United States Bankruptcy Court for the Western District of Oklahoma entered a Judgment in favor of the Trustee, thus avoiding the transfer. The Son timely appeals this final Judgment.[3] The parties have consented to this Court's jurisdiction because they have not elected to have the appeal heard by the United States District Court for the Western District of Oklahoma.[4] For the reasons stated below, the bankruptcy court's judgment is AFFIRMED.

I. Background

In 1978, the debtor and his three brothers, together with their spouses, obtained 176 acres of land located in Edmond, Oklahoma for approximately $400,000 (Family Property). As a result, the debtor and his former spouse, Carol, obtained an undivided partial interest in the Family Property.

The debtor and Carol were divorced in 1982. In the divorce, the debtor obtained sole ownership of the couple's interest in the Family Property. Carol was awarded custody of the couple's two minor children, including the Son, and the debtor was required to make monthly child support payments to Carol. The debtor did not pay child support on a regular basis, and the state court entered at least one judgment against him for past-due support.

In May 1996, the debtor and his new spouse, Pantea, transferred their interest in the Family Property to the Son by quit claim deed. The deed states that the transfer was exempt from documentary stamp tax because it was an intra-family transfer and no consideration was paid. It is undisputed that the Son never paid any taxes, insurance,

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[2] Unless otherwise stated, all future statutory references are to title 11 of the United States Code.

[3] 28 U.S.C. § 158(a)(1); Fed. R. Bankr. P. 8002(a).

[4] 28 U.S.C. § 158(c); Fed. R. Bankr. P. 8001(e).

or maintenance on the Family Property, nor received any income for the Property.[5] It is also undisputed that he never resided on the Family Property. The Son did not record the quit claim deed until May 29, 1998. At that time, the Family Property was alleged to be worth $1,056,000.

In January 1998, Carol sent a letter to the state child support enforcement division, stating that she wanted to "dismiss the $37,500 owed to me by my ex-husband . . . for child support [because my] children are now adults and currently live with [the debtor] . . . [who] is helping them financially . . . ."[6] She asked the state agency to close her case and remove the case from the debtor's credit report, or show that debts associated with the case had been paid in full.

Between 1996 and 1998, the debtor and Pantea transferred at least two other properties to the Son. The Son transferred at least one of the properties back to Pantea. All of these transfers, including the transfer of the Family Property, took place at a time when the debtor and the debtor's closely held corporation, Prestigious Homes by Frank Sadeghy, Inc., were being sued by Shahriar and Mojgan Adibi in state court for breach of contract, breach of warranty, and slander of title (Adibi Lawsuit). On May 27, 1998, the state court entered a judgment against the debtor in Adibi Lawsuit exceeding $100,000.[7] Two days later, the Son recorded his quit claim deed for the Family Property.

In January 2000, the debtor filed a Chapter 7 petition in the Northern District of Georgia. His Chapter 7 case was transferred to the Western District of Oklahoma several months later. The Adibis filed a complaint against the debtor, seeking to have the judgment in the Adibi Lawsuit excepted from discharge under § 523(a)(6), and the

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5 Pretrial Order, Undisputed Facts ¶¶ 26-31, *in* Appellant's Appendix at 41.

6 Avoidance Order ¶ 16, *in* Appellant's Appendix at 259.

7 This judgment was affirmed, but modified, by a state court of appeals. The modified judgment struck a punitive damage award against the debtor, but trebled the actual damages the debtor was required to pay to the Adibis.

Trustee sought denial of the debtor's discharge under several subsections of § 727(a).

Subsequently, in June 2000, the Trustee commenced an adversary proceeding against the Son and others, seeking to avoid the debtor's transfer of the Family Property to the Son pursuant to § 544(b) and Oklahoma fraudulent transfer law (Avoidance Action). The Son filed an Answer, denying that the transfer was avoidable.

The debtor then moved to convert his Chapter 7 case to Chapter 13. The Trustee opposed this motion, but his objection was overruled, and the case was converted to Chapter 13. The Trustee, now the Chapter 13 trustee, pursued the Avoidance Action against the Son in the converted Chapter 13 case.

After a trial in the Avoidance Action, the bankruptcy court entered an Order and separate Judgment, avoiding the debtor's transfer of his interest in the Family Property to the Son. The bankruptcy court held that the Trustee established by clear and convincing evidence that the transfer was a fraudulent transfer under Oklahoma law. It concluded: "Such transfer is hereby avoided and the parties are hereby ordered to take the necessary actions to return the Family Property to Debtor to be made part of his bankruptcy estate for the benefit of his creditors."[8]

This appeal followed.

II. Discussion

The bankruptcy court avoided the debtor's transfer of his interest in the Family Property to the Son pursuant to § 544(b) and § 116(A)(1) of title 24 of the Oklahoma Statutes Annotated [hereinafter the "Oklahoma Statute"]. Section 116(A)(1) states that "[a] transfer is . . . fraudulent as to a creditor . . . if the debtor made the transfer . . . with actual intent to hinder, delay, or defraud any creditor of the debtor . . . ."[9] In determining whether a debtor has acted with actual intent under § 116(A)(1), Oklahoma courts consider eleven "badges of fraud," as set forth in § 116(B) of the Oklahoma

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[8] Order at 25, *in* Appellant's Appendix at 278.

[9] Okla. Stat. Ann. tit. 24, § 116(A)(1).

Statute.[10]

The bankruptcy court correctly applied this law, and concluded that the debtor's transfer of his interest in the Family Property to the Son was fraudulent within the meaning of § 116(A)(1) because six of the eleven badges of fraud set forth in § 116(B) were present. Specifically, the bankruptcy court found that (1) the debtor's transfer of the Family Property interest to his Son was a transfer to an insider, (2) the debtor retained possession and control of the Family Property after the transfer, (3) before the transfer was made, the debtor had been sued or threatened by suit, (4) the value of the consideration received by the debtor for the Family Property transfer was for less than a reasonable equivalent of the value, (5) the debtor was insolvent or became insolvent as a result of the transfer, and (6) the transfer occurred shortly before or after a substantial debt was incurred. Our review of the record shows that the factual conclusions supporting the bankruptcy court's Judgment were largely stipulated to in the Pretrial Order, and that the bankruptcy court's findings of fact related to facts disputed in the Pretrial Order are not contested on appeal or are not clearly erroneous.[11] Accordingly, the bankruptcy court's Judgment in the Avoidance Action must be affirmed.

The Son raises four points of error on appeal. For the reasons discussed below, all of the Son's points of error are without merit.

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[10] Id. § 116(B); *see generally* Hildebrand v. Harrison, 361 P.2d 498 (Okla. 1961); Toone v. Walker, 243 P. 147 (Okla. 1926).

[11] *See* Fed. R. Bankr. P. 8013 ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses."); United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), *quoted in* Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (Findings of fact are clearly erroneous when "although there is evidence to support [them], the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."); United States v. Rodriguez-Aguirre, 108 F.3d 1228, 1238 n.8 (10th Cir. 1997) (appellant bears the burden of providing essential citations to the record and proving error); SEC v. Thomas, 965 F.2d 825, 827 (10th Cir. 1992) (court will not sift through the record to find support for appellant's arguments).

The Son first argues that the bankruptcy court erred in avoiding the transfer of the Family Property interest in its entirety. He claims that under § 119 of the Oklahoma Statute, a creditor-plaintiff in a fraudulent transfer action may obtain "avoidance of the transfer . . . to the extent necessary to satisfy the creditor's claim."[12] Citing a California case interpreting the identical provision of the Uniform Fraudulent Transfer Act, the Son states that the transfer should be avoided only as far as necessary to protect the claims of a creditor, and any surplus equity in the Family Property should be given to him. Because he was entitled to any equity in the Family Property interest under § 119, the Son contends that the bankruptcy court erred in failing to determine whether there was any equity in the Family Property. He cites the following example: "if Debtor's total liabilities are $130,000.00, Section 119 limits avoidance of the transfer to that $130,000.00 amount."[13] The Son asks this Court to remand the case to the bankruptcy court with instructions that it determine the total debts owed by the debtor on the transfer date and limit any avoided transfer to that amount.

Not only is this argument deemed waived inasmuch as it was not raised below,[14] but it is also without merit based on the record. The debtor's Schedules represent that he has $556,398.89 in liabilities. Thus, using the Son's example, if the transfer in question exceeded $556,398.89 in value, the excess should be returned to him. Here, however, the Son repeatedly contends that the equity value of the debtor's interest in the Family Property on the transfer date was anywhere between $112,200 and $178,200. Applying the example used by the Son, there exists no equity in the transfer

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12 Okla. Stat. Ann. tit. 24, § 119(A)(1).

13 Appellant's Brief at 6.

14 *See, e.g.*, Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992) (appellate court will not consider issues not raised below); O'Connor v. City & County of Denver, 894 F.2d 1210, 1214 (10th Cir. 1990) (appellate court will not consider claims that were waived or abandoned in the trial court); *see also* Tele-Communications, Inc. v. Comm'r, 104 F.3d 1229, 1233 (10th Cir. 1997) (parties are "encouraged to 'give it everything they've got' at the trial level.")(quotation omitted).

to give to him because the transfer was worth considerably less than the total debts asserted by the debtor.

The Son's second point of error is that the bankruptcy court erred in finding that the debtor owned a 22.5% interest in the Family Property because it was his family's common understanding that the debtor only owned a 20% interest. In making this argument, the Son has not shown the place in the record where a 20%, as opposed to 22.5%, ownership interest was established and, therefore, it must be rejected.[15] But, even if the bankruptcy court erred in attributing a 22.5% interest in the Family Property to the debtor, its error is harmless because the result in this case is not changed. The debtor's ownership interest in the Family Property is relevant to the badge of fraud related to whether reasonably equivalent value was exchanged for the transfer. The bankruptcy court's conclusion that reasonably equivalent value was not exchanged for the transfer would not be erroneous if the debtor's interest were reduced from 22.5% to 20% because a transfer of the lesser ownership interest would still far exceed any consideration given by the Son.[16]

The Son next argues that the bankruptcy court erred in basing its reasonably equivalent value analysis on a 25% ownership interest. The Son is correct. The bankruptcy court held that the debtor owned a 22.5% interest in the Family Property, but it then went on to state that the value of the interest on the transfer date was $198,000 – this amount being the value of a 25% interest. Despite this error, the bankruptcy court will not be reversed, because the error is harmless.

As noted above, the debtor's ownership interest in the Family Property and the value of that interest is relevant in determining whether the debtor received reasonably equivalent value in exchange for the transfer to the Son. Assuming that the numbers used by the Son are correct – a 25% interest in the Family Property was worth

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15 *See* Rodriguez-Aguirre, 108 F.3d at 1238 n.8; Thomas, 965 F.2d at 827.

16 *See* discussion *infra*.

$198,000, a 22.5% interest was worth $178,200.00, and a 20% interest was worth $158,400.00 – the value of the debtor's ownership interest in the Family Property far exceeded any consideration given by the Son. Specifically, from the face of the deed transferring the Family Property to the Son, it is undisputed that the Son paid no consideration for the Family Property. Zero consideration for a transfer of a 22.5% interest – worth $ 178,200.00 – is not reasonably equivalent value. Moreover, even if the debtor's child support debt could be considered to be consideration for the transfer to the Son, the amount of that debt was only $37,500.[17] The bankruptcy court would not have erred in determining a lack of reasonably equivalent value when this sum is compared with the value of the 22.5% interest.

The Son's final argument is that the bankruptcy court erred in determining that the debtor's transfer of the Family Property to him was made for no consideration or for less than a reasonably equivalent value. In making this argument, the Son primarily attacks the following findings of fact and conclusion of law made by the bankruptcy court:

> "Badge of fraud" number 8 [under § 116(b)] was met when Son admitted he paid no consideration for the Family Property, and even if Debtor was legally allowed to offset the past due child support by transferring land to his Son, there was too great a difference between the value of the Family Property and the value of the child support arrearage for the forgiveness of the child support arrearage to be deemed adequate consideration. Further, if release from child support arrearage had been consideration for the transfer of the Family Property, that purpose should be . . . disclosed and the documentary stamp tax should have been paid upon the transfer. Further, Carol's letter to DHS indicated she considered the child support arrearage to have been paid by Debtor's financial support of her two children after they reached adulthood.[18]

In this provision, the bankruptcy court first held that the Son gave no consideration for the transfer of the Family Property. This conclusion is fully supported by the face of the

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17 Id.

18 Judgment at 23, *in* Appellant's Appendix at 276.

quit claim deed,[19] and by the Pretrial Order, where it was stipulated that the quit claim deed transferring the debtor's interest in the Family Property to the Son states that it was a transfer for no consideration and no tax was paid in connection with the transfer.[20] Accordingly, this finding of fact is not clearly erroneous.

The bankruptcy court alternatively held that even if release of the debtor's child support debt could be deemed to be consideration, the consideration was not of a reasonably equivalent value because "[n]o more than $37,500 was owed by Debtor to Carol Ann Gibson in child support arrearage."[21] Our review of the record shows that this conclusion is not clearly erroneous.

The Son contests this alternative finding of less than reasonably equivalent value, claiming that in determining value, the bankruptcy court failed to take into consideration the debt against the Family Property, in the amount of $64,000.00, and the true value of the child support debt, alleged to be $80,000.00. He argues that when the $64,000.00 debt is deducted from the value of the Family Property – $158,400.00 (based on a 20% interest) or $178,200.00 (based on a 22.5% interest) – the debtor's real interest in the Family Property was between $94,400.00 and $114,200.00. When these sums are compared to the $80,000.00 value of the debtor's the child support debt, the Son argues that reasonably equivalent value was exchanged for the transfer because there was only a $14,400.00 or $34,200.00 difference between what was received and what was given in the transfer.

Even assuming that the $64,000 mortgage was valid and could be deducted from the value of the debtor's interest in the Family Property, the Son's argument fails because, as stated above, the bankruptcy court's finding of fact that the debtor's child support debt did not exceed $37,500 is not clearly erroneous. Indeed, the bankruptcy

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19 Appellee's Appendix at 2.

20 Pretrial Order, Stipulations ¶ 13, *in* Appellant's Appendix at 40.

21 Judgment at 21, *in* Appellant's Appendix at 274.

court expressly stated that Carol's testimony regarding the amount of the child support debt was not credible. Accordingly, giving deference to the finder of fact as we are compelled to do,[22] the $37,500 child support debt must stand. When this $37,500 amount is compared with the values of the Family Property considered without the mortgage – $158,400.00/178,200.00 – or with the mortgage – $94,400.00/$114,200 – the bankruptcy court's conclusion that the Son did not give reasonably equivalent value for the transfer was not clearly erroneous.

In affirming the bankruptcy court, we note the Son has only attacked the bankruptcy court's conclusion that the transfer in question was for a less than reasonably equivalent value. The transfer avoided, however, was found to be fraudulent based on six badges of fraud, not just the reasonably equivalent value factor. He has not even questioned the conclusions with regard to any of the other badges of fraud, and it is arguable that even if he were correct that the bankruptcy court erred in finding less than reasonably equivalent value, the transfer of the Family Property would nonetheless be avoidable under the other wholly uncontested badges of fraud.[23]

III. Conclusion

For the reasons stated above, the bankruptcy court's Judgment is AFFIRMED.

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[22] *See* n.11 *supra*.

[23] *See, e.g.*, Hildebrand, 361 P.2d at 505 (single badge of fraud may make conveyance fraudulent).